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Case No.

In The

SUPREME COURT OF THE UNITED STATES

JAMES A. GARDNER,

Petitioner,

v.

THE BRADENTON HERALD, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

AND APPENDIX

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QUESTION PRESENTED

WHETHER SECTION 934.091, FLORIDA STATUTES (1977) IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE FREEDOM OF THE PRESS PROVISIONS OF THE UNITED STATES CONSTITUTION.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

OPINION BELOW

The opinion of the Supreme Court of the State of Florida, not yet reported, appears in the appendix hereto as "A1-22."

JURISDICTION

The Supreme Court of Florida entered its judgment on March 1, 1982. It denied a timely petition for rehearing on April 28, 1982 and this petition for certiorari was filed within ninety days of that date.

QUESTION PRESENTED

Whether Section 934.091, Florida Statutes (1977) is unconstitutional because it violates the freedom of the press provisions of the United States Constitution.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Respondent, plaintiff below, Bradenton Herald, Inc., filed an action for declaratory decree against Petitioner, James A. Gardner, in his official capacity as State Attorney for the Twelfth Judicial Circuit of Florida on August 17, 1979 (A23-30)

Following a Motion to Dismiss, Respondent filed an Amendment to Complaint (A31-32) and an Amendment to Amended Complaint (A41-42). Petitioner filed his Answer on September 27, 1979 (A43-46).

As grounds for relief, the Amended Complaint alleged that Section 934.091, Florida Statutes (1977), was unconstitutional as a prior restraint on Freedom of the Press and for placing criminal sanctions upon the publication of the names of persons who have been the subject of a legal wiretap. The Respondent alleged that they had the name and identity of a person or persons who had neither been indicted nor informed against by the Petitioner or other appropriate prosecuting authority, which person or persons may or may not now have been served with an inventory or notification of interception of wire or oral communications pursuant to the provisions of Section 934.09(7), Florida Statutes (1977), whose wire or oral communications have, in fact, been intercepted. The Respondent further alleged that it was its purpose and intent

to publish the names of the said individuals as prohibited by the provisions of the subject statute (A17).

In Petitioner's Answer, the Petitioner alleged that the information sought to be published was not lawfully obtained information and therefore not afforded First Amendment protection (A21). This affirmative defense was striken by the Court and the Court specifically held that whether the names were lawfully or unlawfully obtained was irrelevant.

The Petitioner also filed a Motion to Compel Oral Discovery in order to take the deposition of Robert Ratner, a reporter for the Bradenton Herald, Inc. The Purpose of Oral Discovery was to determine the name of the person in the possession of the newspaper who was the alleged subject of the wiretap and,

should the name prove to be a wiretap subject, the source of the information to determine whether the information was lawfully obtained. The Court granted the Petitioner's motion insofar as it allowed the Petitioner to determine the name of the subject, but refused to require the reporter to divulge the manner in which it was obtained (A47-51).

The name was verified as being that of John Doe, intervenor in this cause. The deposition of Robert Ratner was sealed by court order in order to prevent the name of John Doe from becoming a part of the public record.

The case proceeded to final hearing on November 16, 1979. The Petitioner and the Intervenor alleged and argued two compelling governmental interests in the subject statute; the necessity for secrecy in an ongoing criminal

investigation concerning wiretaps and the right to privacy of the person who is the subject of the wiretap (A52-56).

On February 12, 1980, the Court entered a final judgment declaring Section 934.091, Florida Statutes (1977) unconstitutional as an infringement on the First Amendment freedom of the press, and as being vague (A57-62).

A timely motion for rehearing was filed by the Petitioner (A63-70) and denied by the Court (A71-72).

Timely notice of appeal was filed and the Supreme Court of Florida's jurisdiction was invoked pursuant to Fla. R.App. P. 9.030(a)(1)(A). The Supreme Court of Florida adopted the reasoning of the trial court and found Section 934.091, Florida Statutes to be unconstitutional (A1-22). A timely

petition for rehearing was filed by the Petitioner (A73-77) and denied by the Court (A78-79).

Petitioner filed a timely Motion to Stay Mandate in the Supreme Court of Florida, which was granted up to and including May 28, 1982, in order to allow Petitioner to seek review of this Court (A 80-81).

Petitioner next filed Motion to Extend Stay of Mandate in this Court, which was denied on May 25, 1982 (A 82). This Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

SECTION 934.091, FLORIDA STATUTES (1977) DOES NOT VIOLATE THE FREEDOM OF THE PRESS PROVISIONS OF THE UNITED STATES CONSTITUTION.

In declaring Section 934.091, Florida Statutes (1977) unconstitutional, the Florida Supreme Court determined that statute resulted in a prior restraint on the press.

The challenged Statute reads as follows:

> "934.091 Unlawful to publish names of parties to intercepted communications; penalty, - -
> (1) No person shall print, publish, or broadcast, in any newspaper, magazine, periodical, or other publication, or from any television or radio broadcasting station, the name or identity of any person served with, or to be served with, an inventory or notification of interception of wire or oral communications pursuant to a 934.09(7)(e) until said person has been indicted or informed against by the appropriate prosecuting authority.

> (2) Whoever is convicted of the violation of the provisions of this section is guilty of a felony of the third degree, punishable as provided in s. 775.082, by a fine not to exceed $10,000 or as provided in s. 775.084.

This statute does not constitute a "prior restraint" on the freedom of the press since there is no prior injunction or restraining order against publication. Compare Nebraska Press Association v. Stuart, 427 UA 539, 96 S.Ct. 2791, 49 L.Ed 2d 683 (1976) with Landmark Communications, Inc. v. Virginia, 435 US 829, 98 S.Ct. 1535, 50 L.Ed 2d 1 (1978) and Smith v. Daily Mail Publishing Co., 443 US 97, 99 S.Ct. 2667, 61 L.Ed 2d 399 (1979).

This distinction is really of no concern, however, since the statute does impose criminal penalties. As the United States Supreme Court recently

stated in Smith v. Daily Mail Publishing Company, supra:

> "(3) Whether we view the statute as a prior restraint or as a penal sanction for publishing *lawfully obtained*, truthful information is not dispositive because even the latter action requires the highest form of state interest to sustain its validity. Prior restraints have been accorded the most exacting scrutiny in previous cases. See Nebraska Press Association v. Stuart, supra, at 419, 49 L.Ed 2d 683, 96 S.Ct. 1791; Organization for Better Austin v. Keefe, supra at 419, 29 L.Ed 2d 1, 91 S.Ct.1575; Near v. Minnesota ex rel Olsen, supra at 716, 95 L.Ed 2d 1357, 51 S.Ct. 625. See also Southeastern Promotions, Ltd. v. Conrad, 420 US 546, 43 L.Ed 2d 448, 95 S.Ct. 1239 (1975). However, even when a state attempts to punish publication after the event it must nevertheless demonstrate that its punitive action was necessary to further the state interests asserted. Landmark Communications, Inc. v. Virginia, supra at 843, 56 L.Ed 2d 1, 96 S.Ct. 1535."
> (61 L.Ed 2d 404)

The question therefore is whether the statute furthers the state interests

asserted. In order to sustain validity, the state interest must be of the highest form.

Petitioner is not unmindful of the role of the press and the ends to be achieved through the freedom afforded it:

> "A responsible press has always been regarded as the handmaiden of effective judicial administration . . . its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."
>
> Sheppard v. Maxwell, 384 US 333, 340, 86 S.Ct. 1507, 16 L.Ed 2d 600 (1966).

However, the state interests in this statute are of the highest form and, when balanced against the very limited intrusion into the First Amendment, the results indicate that the statute

passes constitutional muster.

There are two very important interests to be protected by Section 934.091. The first is the protection of the integrity of an ongoing criminal investigation. The second is the right to privacy of the individual who is the subject of the wiretap.

Chapter 934 presents a comprehensive plan for the use of wire and oral communications. It provides protection to the individual from unreasonable seizure of such communications as well as the right of state police agencies to intercept and use such communications in criminal investigations and as evidence when based upon probable cause. A fine balance has been struck between the rights of the individual and the interests of law enforcement:

> "934.01 Legislative findings -- On the basis of its own investigations and of published studies, the Legislature makes the following findings:
>
> (3) Organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice.
>
> (4) To safeguard the privacy of innocent persons, the interception of wire or oral communications when none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurance that the interception is justified and that the information obtained thereby will not be misused."

By statute, a wiretap order cannot be issued unless it is based upon probable cause, Section 934.09(3),Florida Statutes (1979). However, before such an order

can be issued it must be shown that the law enforcement agency has reasonably exhausted other investigative techniques or that other available techniques are unlikely to succeed or are too dangerous. See State v. Barnett, 354 So.2d 422 (Fla. 2d DCA 1978). As such, a wiretap is virtually a last resort device, the success of which depends *exclusively* upon the fact that the parties being intercepted have absolutely no knowledge of the wiretap.

There can be no doubt that the protection of an ongoing criminal investigation is a compelling governmental interest of the highest order, which is rendered useless when a subject reads in the newspaper or sees a report on television that his phone is presently being wiretapped in connection with a criminal investigation. The injury does

not stop there. Whenever a wiretap order is issued, there has to be probable cause to believe that communications concerning an offense will be intercepted. This presupposes that more than one individual is involved in the crime. Therefore, if but one person's name is published, an entire investigation into the criminal activities of numerous individuals is destroyed. (See Justice Atkins dissenting opinion). This is particularly true in investigations concerning narcotic or other dangerous drugs, gambling, dealing in stolen property, Florida Anti-Fencing Act violations and criminal conspiracies to commit such acts. Such a disclosure can also cost the life of an individual as in kidnapping cases.

The Florida Supreme Court opinion also overlooks the statutory right to privacy which is the gravamen of Chapter 934. See Section 934.01(4), Florida Statutes (1979). This right to privacy has withstood a First Amendment attack before the Court in the recent past. Shevin v. Sunbeam Television Corporation, 351 So.2d 723 (Fla.1977).

Against these interests must be balanced the limited intrusion into the First Amendment which this statute entails. Section 934.091 only abridges publication of the name or identity of the person served with or to be served with an inventory of notification of interception until that person has been indicted or informed against. In other words, only during the crucial period of time during a criminal investigation that the subject does not know he has been wire

tapped is the press in any way abridged. At the point where the secrecy of the investigation is no longer imperative, the statute allows publication.

A comparison of the statute in question with the statute and analysis contained in Smith v. Daily Mail, supra, demonstrates the soundness of this law. In Smith, two newspapers of general circulation in West Virginia published the name of a fourteen year old boy who was arrested in connection with the shooting death of a schoolmate. A West Virginia statute declared such publication a crime punishable as a misdemeanor. An indictment was lodged against the two newspapers who then sought and received a writ of prohibition from the West Virginia Supreme Court of Appeals. The prosecutor and the county court judge petitioned to this Court. In affirming the West

Virginia Supreme Court, this Court did not reach the issue of whether the statute was a "prior restraint." This Court held that there was no doubt about the fact the juvenile's name was lawfully obtained. The reporter had received it from witnesses and police officers at the scene of the incident. This Court further pointed out that the statute applied only to newspapers and not to the media as a whole. In fact, three radio stations had broadcast the name of the juvenile before the Daily Mail decided to publish it.[1/] Quoting Cox Broadcasting Corp. v. Cohn, 420 US 469, 95 S.Ct. 1029, 43 L.Ed

1/ In Mr. Justice Rehnquist's concurring opinion, he found this to be the dispositive point concerning the constitutionality of the statute. Since the statute did not apply to the electronic media, it didn't further the state interest asserted by preserving the anonymity of the juvenile. Had it applied uniformly to all media, he would have found it constitutional.

2d 328 (19750, the Court stated:

> "By placing the information in the public domain on official court records, the STate must be presumed to have concluded that the public interest was thereby being served. . . States may not impose sanctions on the publication of truthful information contained in official records open to public inspection. Id. at 495,43 L.Ed 2d 328,95 S.Ct. 1029." (61 L.Ed 2d at 405)

The sole interest advanced by the State to justify the statute was to protect the anonymity of the juvenile offender. The Court held that this state interest was not sufficient to justify the application of criminal penalties to respondents and that the statute's approach did not satisfy constitutional requirements since it did not restrict the electronic media as well.

Compared with the law in Smith, the statute sub judice suffers no such infirmities. The information sought to be published by the Bradenton Herald is not now and never has been a part of the public record of any county of this state. The

statute in question applies uniformly to the electronic media as well as the press. Also, the information sought to be published in the case sub judice was not *lawfully obtained!* Section 934.091 (1) states that *"No person* shall print, publish or broadcast, or *cause to be* printed, published or broadcasted.

Section 934.02(5),Florida Statutes (1979) defines "person" for the purposes of this chapter as *"any employee or agent of the state or political subdivision thereof* and any individual, partnership, association, joint stock company, trust or corporation: Therefore, the name of the subject of a wiretap obtained from an agent of a political subdivision of this state who is inside a criminal investigation is not lawfully obtained information since the agent is committing a crime by disclosing the name to the reporter.

Taken together with the two compelling state interests involved, the limited infringement caused by this statute upon Respondent's right to print the name of a wiretap subject is neither unreasonable nor unconstitutional. The destructive impact that such a disclosure could have on an ongoing criminal investigation is enormous.

The United States Fifth Circuit Court of Appeals has ruled that newsgathering warrants some degree of First Amendment protection, and while the extent of such protection has remained somewhat uncertain, it is clear that it is not without bounds. United States v. Gurney, 558 F.2d 1302,1308 (5th Cir. 1977). The right to speak and publish does not carry with it the unrestrained

right to gather information, Zumel v. Rusk,381 US 1,17, 85 S.Ct. 1271,1281, 14 L.Ed 2d 179 (1945). The First Amendment right to gather news has been defined in terms of information to the public generally, Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed 2d 626 (1972). See also: Pell v. Procunier, 417 US 817, 94 S.Ct. 2800, 41 L.Ed 2d 495 (1974) and Garrett v. Estelle, 558 F.2d 26, 1274 (5th Cir. 1977). The press cannot be denied access to information already within the public domain, Cox Broadcasting Corp. v. Cohn, supra. Yet, the United States Constitution does not require the government to accord the press special access to information not shared by members of the public generally. United States v. Gurney, supra. Denials of access to proceedings such as Grand

Jury hearings and judicial conferences are based upon fundamental governmental interests and protection of other rights which override the concerns of the public. Id. Thus, a statute making it a crime to publish specific information as in Section 934.091 represents a valid public interest as determined by the Legislature. See also: United States v. Woods, 544 F.2d 242 (6th Cir. 1976, rehearing denied 1977).

Analogous to the case at bar is State v. Evjue, 253 Wis. 146, 33 N.W. 2d 305 (1948), which upheld the validity of a state statute penalizing newspaper, magazine, periodical or circular publications of the identity of a female subjected to a rape or similar criminal assault. In so holding, the Court stated that the slight restriction of freedom of the press proscribed by the statute is outweighed by

the interests in avoiding embarrassment and offensive publicity of the victim. The Evjue case is still good law, and has been reaffirmed according to 86 A.L.R. 3d 80 which cited Cox Broadcasting Corp. v. Cohn, supra and Napier v. Jefferson Life Insurance Co., 322 F.2d 502 (4th Cir. 1963) which upheld a similar South Carolina statute.

This concept that the First Amendment is not an unlimited, unrestricted, absolute right was reiterated in United States v. Fuller, 202 F.Supp. 356, U.S.D.C. (Cal. 1967). That case dealt with a California statute proscribing unauthorized interception of communications by wire or radio, which the Court explained had been upheld on a number of occasions. A newspaper man obtained information by listening to a police broadcast radio, contending it was a public information which he could

gather and publish. In dismissing that argument, the Court stated that Congress has the power to forbid wire-tapping, interception, and divulgement of protected radio messages. Id. p. 358. The Fuller court again upheld the California statute as being an exception to freedom of the press, stating that it is so clear and apparent that any change in the law is for the legislature, and not the courts. Id. p. 359.

Unless the First Amendment is an absolute, this statute is constitutional. It is uniform in application, imposes but a limited infringement, and serves compelling state interests.

The prevailing view is that the press is not free to publish with impunity everything and anything it desires to publish, Branzburg v. Hayes, supra.

The judgment of the Supreme Court of Florida declaring Section 934.081, Florida Statutes (1977) unconstitutional should be reversed.

CONCLUSION

For these reasons, Petitioner respectfully urges this Court to grant certiorari and reverse the holding of the Supreme Court of Florida.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to Larry K. Coleman, Esquire, Knowles, Blalock, Coleman, Landers & Walters, P. A., 802 11th Street, West, Bradenton, Florida on this the 31st day of July, 1982.

Of Counsel for Petitioner

APPENDIX

SUPREME COURT OF FLORIDA

Nos. 58,761 and 58,735

JAMES A. GARDNER,
Appellant,

vs.

THE BRADENTON HEARLD, INC.
Appellee,

JOHN DOE, Appellant,

vs.

THE BRADENTON HERALD, INC.
Appellee.

(March 4, 1982)

OVERTON, J.

This is an appeal from a trial court judgment holding section 934.091, Florida Statutes (1977), unconstitutional because it violates the freedom of the press provisions of the United States Constitution. The subject statutory section makes it a third-degree felony for any person to

publish or broadcase in a newspaper, publication, or electronic medium the name of any person who is a party to an interception of wire or oral communications until that person has been indicted or informed against. We have jurisdiction. Art. 7, s. 2(b)(1), Fla. Const. (1972). We affirm.

This cause commenced when the Bradenton Herald, a newspaper of general circulation, sought a declaratory judgment against State Attorney James Gardner as to the constitutional application of Section 934.091. The Herald possessed and wished to publish the names of persons who were the subjects of a wire intercept, among them that of intervenor John Doe. The trial court granted the requested relief, finding the statutory prohibition "obviously unconstitutional." The trial court further found the statute was an unconstitutional restriction on the freedom

of the press.

The sole and limited issue for our determination concerns the authority of the state to direct without exception or procedural safeguards the criminal punishment of any person who truthfully publishes without notice the name of an unindicted subject of interceptions or wiretaps.

Section 934.091, Florida Statutes (1977) reads as follows:

> (1) No person shall print, publish or broadcast, or cause to be printed, published or broadcasted, in any newspaper, magazine, periodical, or other publication, or from any television or radio broadcasting station, the name or identity of any person served with, or to be served with an inventory or notification of interception of wire or oral communications pursuant to s. 934.09(7)(e) until said person has been indicted or informed against by the appropriate prosecuting authority.
>
> (2) Whoever is convicted of the violation of the provisions of this section is guilty of a felony of the third degree, punishable as

> provided in s. 775.082 by a fine not to exceed $10,000, or as provided in s.775.084.

In our opinion, the statute, in its present format, is an unconstitutional restraint upon the freedom of the press guaranteed by the first and fourteenth amendments to the United States Constitution. The absolute terms of this statute effectively result in a piror restraint on the press. Prior restraints have always been accorded the most exacting judicial scrutiny. Nebraska Press Association v. Stuart, 427 U.S.419 (1976). Southeastern Promotions, Ltd. v. Conrad, 420 US 546 (1975). The United States Supreme Court has made it clear that the method of imposing restrictions on the press is not the critical factor:

> Whether we view the statute as a prior restraint or as a penal sanction for publishing lawfully obtained truthful information is not

> dispositive because even the latter action requires the highest form of state interest to sustain its validity.

Smith v. Daily Mail Publishing Co., 441 U.S. 97,101-02 (1979). The Supreme Court has recently defined the relevant constitutional standards in Landmark Communications, Inc. v. Virginia, 435 U.S.829 (1979), and then commented in Daily Mail that "state action to punish the publication of truthful information seldom can satisfy" such standards. 443 U.S. at 1012.

In Landmark, a newspaper was fined under a statute for truthfully publishing the identity of a judge under investigation by the Virginia Judicial Inquiry and Review Commission. The Court posed the issue as follows:

> It can be assumed for purposes of decision that confidentiality of Commission proceedings serves

> legitimate state interests. The question, however, is whether these interests are sufficient to justify the encroachment on First Amendment guarantees which the imposition of criminal sanctions entails . . . .

435 U.S. at 841. The Court concluded that the publication Virginia sought to punish lay "near the core of the First Amendment . . . " and reiterated that the conclusion in Mills v. Alabama, 384 U.S. 214,218 (1966), that "a major purpose of that Amendment was to protect the free discussion of governmental affairs." 435 U.S. at 828.

The Landmark issue is almost identical to that in the instant case. As in Landmark, the instant statute asserts through the means of criminal sanctions that the total confidentiality of a governmental activity is a legitimate state interest that must be

preserved even at the cost of restraint upon the press. Also as in Landmark, the state in the instant case generally asserted that absent criminal sanctions the objectives of the statutory scheme would be seriously undermined. While not dispositive, we note that although most of chapter 934 tracks the federal wiretap law contained in 18 U.S.C. s. 2510-2520 (1976), there is no provision in the federal statute which corresponds to section 934.091.

Clearly, there is no meaningful way under the statute to balance the asserted overriding governmental interest allegedly inherent in the confidentiality sought here with the restrains on the first amendment rights of the appellee newspaper. The statute as written is thus clearly unconstitutional.

We do not minimize the asserted state interests which could be affected by the contemplated publication. We believe it is important to recognize that we are not faced in this cause with a narrowly drawn statute closely tailored to interests such as protecting the national security, protecting the safety of undercover officers, preserving an ongoing investigation, protecting the life of a kidnap victim, or ensuring a fair trial, nor are we faced with a statute incorporating adequate procedural safeguards such as a prior hearing before a court of competent jurisdiction which would allow a balancing of interests. Finally, we emphasize that this case does not involve any question of access of the press in the identities of persons whose communications have been intercepted under chapter 934.

We also do not have before us, nor do we reach, any question concerning the possible private cause of action that John Doe or similarly situated persons might have for libel or invasion of privacy against any news medium. We decline appellant Gardner's invitation at oral argument to retroactively apply our newly approved constitutional right of privacy[1] to sustain the constitutionality of section 934.091. The state in the person of the state attorney has no standing on this proceeding to assert the privacy rights of those persons it has wiretapped.

The judgment below is affirmed.

It is so ordered.

SUNDBERG,C.J., BOYD, ALDERMAN and MCDONALD, J.J., Concur
ADKINS,J., Dissents with an opinion

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

1
Section 22 of article I of the Florida Constitution approved by the electorate in November of 1980, provides:

> SECTION II. Right of privacy- - Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

ADKINS, J., Dissenting.

The Bradenton Herald, hereinafter referred to as the Herald, filed an action seeking a declaratory judgment as to the constitutional application of Section 934.091, Florida Statutes (1977), by James A. Gardner as state attorney. The Herald alleged that it had the name and identity of persons neither indicted nor informed against by Gardner, which persons had not been served with an inventory or notification of interception of wire or oral communications pursuant to section 934.09(7), Florida Statutes (1977). The Herald alleged that it intended to publish the names of these individuals, which publication is prohibited by the provisions of section 934.091, Florida Statutes. The plaintiff alleged that the statute was unconstitutional on its face, was overbroad, was an

unreasonable restraint on the freedom of the press and publication enjoyed by the Herald, and had a chilling effect on the publication by the Herald.

John Doe was allowed to intervene when he filed his petition alleging that the publication of the identity of persons who have had their telephones tapped, and persons who have been intercepted on tapped telephones, would be a violation of their right of privacy protected by the United States Constitution and the Florida Constitution and that this right is paramount to any claim of freedom of press and publication. Doe alleged that he was one of the "unnamed persons" referred to in the Herald's complaint who has neither been indicted or informed against and had not been served with an inventory or notification of interception of wire or oral communication.

The question of the right of privacy of John Doe is at issue because of the implication of a published article involving a large-scale drug investigation which specifically names John Doe as being interested, thus placing that individual in an improper, unlawful, or fraudulent light.

In Katz v. United States, 389 U.S. 347 (1967), the Court pointed out that the protection of a person's general right to privavy is, like the protection of his property and of his very life, left largely to the law of the individual states, but that various provisions of the federal constitution protect personal privacy from governmental invasion. The law of Florida recognizes this right to privacy in Section 934.01,Florida Statutes (1977), which reads as follows:

Legislative findings.--On the basis of its own investigations and of published studies, the legislature makes the following findings:

* * * * *

(2) In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of intrastate commerce, it is necessary for the legislature to define the circumstances and conditions under which the interception of wire and oral communications may be authorized and to prohibit any unauthorized interception of such communications and the use of the contents thereof in evidence in courts and administrative proceedings.

(3) Organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice.

(4) To safeguard the privacy of innocent persons, the interception of wire or oral communications when none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under

> the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurance that the interception is justified and that the information obtained thereby will not be misused.

Chapter 934 presents a comprehensive plan for the use of wire and oral communications. It provides protection to the individual from unreasonable seizure of such communications as well as the right of state police agencies to intercept and use such communications in criminal investigations and as evidence when based upon probable cause. A fine balance has been struck between the rights of individuals and the interest of law enforcement.

Before a wiretap order can be issued, it must be shown that the law enforcement agency has reasonably exhausted other

investigative techniques, or that other available techniques are unlikely to succeed or are too dangerous. As such, a wiretap is virtually a last resort device, the success of which depends exclusively upon the fact that the parties being intercepted have absolutely no knowledge of the wiretap.

There can be no doubt that the protection of an ongoing criminal investigation is the compelling governmental interest of the highest order, which is rendered useless when a subject reads in a newspaper or sees a report on television that his phone is presently being wiretapped in connection with a criminal investigation. The injury does not stop there. Whenever a wiretap order is issued, there has to be probable cause to believe communications concerning an

offense will be intercepted. This presupposes that more than one individual is involved in the crime. Therefore, if but one person's name is published, an entire investigation into the criminal activiies of numerous individuals is destroyed. This is particularly true in investigations concerning narcotic or other dangerous drugs, gambling, dealing in stolen property, Florida ani-fencing act violations, and criminal conspiracies to commit such acts. Such a disclosure can also endanger the life of a individual, as in kidnapping cases.

The exhaustive showing which is required to be made prior to its approval assures that a wiretap is necessary, that other investigative techniques have failed, or will fail, and that absolute secrecy is a necessity. Having succeeded

in meeting such a burden in initially procuring a wiretap order, it should not be necessary to go through a repetitious procedural hearing which would fail to prove anything that has not already been shown. Procedural rules in Section 934.091 would be a mere charade, accomplishing nothing and complicating much.

The nature of a wiretap, i.e. that it cannot be successful unless it is secret, and the heavy burden met in justifying the same, combine to obviate the need for procedural safeguards in this statute. That the government succeeded in having the instant wiretap approved demonstrates, without more, that the names involved should not be published prior to completion of the operation. A statute recognizing such is not unconstitutional.

There are, therefore, two compelling state interests involved: the first is

the protection of the integrity of an ongoing criminal investigation; the second is the right to privacy of the individual who is the subject of the wiretap, as well as the innocent individuals who happen to make a telephone call to the phone which is being wiretapped. The limited infringement caused by this statute upon the Herald's right to print the name of a wiretap subject is neither unreasonable nor unconstitutional. The investigative impact of such a disclosure would have on an ongoing criminal investigation is enormous.

The determination of issues pitting the first amendment rights against privacy rights demands a delicate balancing because in the sphere of collision between claims of privacy and those of free speech, the interests of both sides are plainly rooted in the traditions and significant concerns of the American society. In accordance

with the principles announced in Katz v. United States, the legislature of Florida by section 934.01, Florida Statutes (1977), safeguards the privacy of innocent persons during the interception of wire or oral communications. Section 934.091 only abridges publication of the name or identity of the person served with or to be served with an inventory or notification of interception until that person has been indicted or informed against. In other words, only for that crucial period of time during a criminal investigation when the subject does not know he has been wiretapped is the press in any way abridged. At the point where the secrecy of the investigation is no longer imperative, the statute allows publication.

The use of wire interception is a necessary tool in fighting organized crime. The state interests and this statute are

of the highest form and, when balanced against the very limited intrusion into the first amendment, the results indicate that the statute passes constitutional muster.

The majority declines to retroactively apply our newly approved constitutional right of privacy amendment to sustain the constitutionality of section 934.091, Florida Statutes (1977). The publication has not yet been made, so John Doe should have the right to invoke his constitutional privilege of privacy when the publication is eventually made after the majority opinion is filed. Only then will his privacy rights be invaded. If Section 934.01, Florida Statutes (1977), quoted above, was not sufficient to tip the scales in favor of the right of privacy, then certainly the constitutional amendment would have that effect.

In my opinion the judgment of the trial court should be reversed.

Two Consolidated Appeals from the Circuit Court in and for Manatee County.

Robert E.Hensley, Judge - Case No. 79-1383 54 426

Jim Smith, Attorney General and James A. Purdy, Assistant Attorney General, Tampa, Florida for James A. Gardner and Edwin T. Mulock and Robert A. Farrance of Mulock and Farrance, Bradenton, Florida for John Doe.

Appellants

Larry K. Coleman of Knowles, Blalock, Coleman and Landers, Bradenton,Florida

For Appellee

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR MANATEE, COUNTY

THE BRADENTON HERALD, INC., A Florida Corporation,

Plaintiff,

v. Case No. CA 79-1383 54 426

JAMES A. GARDNER, as State Attorney for the Twelfth Judicial Circuit of Florida

Defendant.

ACTION FOR DECLARATORY DECREE

Plaintiff, the Bradenton Herald, Inc., a Florida corporation, sues Defendant, James A. Gardner, as State Attorney for the Twelfth Judicial Circuit of Florida, and alleges:

1. This is an action maintained pursuant to the provisions of Chapter 86, Florida Statutes (1977) seeking a declaratory judgment as to the constitutional application of Section 934.091, Florida Statutes (1977) by Defendant against the Plaintiff.

2. Defendant is a necessary party consistent with the provisions of Section 86.091, Florida Statutes (1977) being the duly elected State Attorney of the Twelfth Judicial Circuit of Florida, in and for Manatee County.

3. Plaintiff maintains its principal place of business within Manatee County, Florida, and is a newspaper of general circulation throughout said County, published on a daily basis.

4. Section 934.091, Florida Statutes (1977) provides as follows:

> (1) No person shall print, publish or broadcast, or cause to be printed, published or broadcasted, in any newspaper, magazine, periodical, or other publication, or from any television or radio broadcasting

station, the name or identity of any person served with, or to be served with an inventory or notification of interception of wire or oral communications pursuant to s. 934.09(7)(e) until said person has been indicted or informed against by the appropriate prosecuting authority.

(2) Whoever is convicted of the violation of the provisions of this section is guilty of a felony of the third degree punishable as provided in s. 775.082, by a fine not to exceed $10,000, or as provided in s. 775.084.

3. At the time of the filing of this action there is an imminent threat of criminal prosecution pursuant to the provisions of the above referenced Statute by Defendant of the Plaintiff for the reasons that:

A. Plaintiff has the name and identity of persons who have neither been indicted nor informed against by the Defendant or other appropriate prosecuting authority, which persons have not now been served with an inventory or notification of interception of wire or oral communications pursuant to the provisions of Section 934.09(7), Florida Statutes (1977) whose wire or oral communications have in fact been intercepted.

B. It is the purpose and intent of Plaintiff to publish names of said individuals as prohibited by the provisions of 934.091, Florida Statutes (1977) which in its application to the Plaintiff herein is unconstitutional on the face of such Statute.

C. The literal wording and patent overbreadth of such Statute would preclude the Plaintiff's publication of the name of said individuals with or without knowledge of any interception regardless of whether or not said publication of their names was made in connection with a story pertaining to the interception of the wire or oral communications of said individuals or the

unknowing publication of the names of said individuals in an article unrelated to said interception of wire or oral communications.

D. The United States Constitution and Florida Constitution protect the freedom of press and publication without this unreasonable restraint thereon.

E. As a consequence of the Defendant's interception of the wire or oral communications of these three individuals Plaintiff will be criminally prosecuted by the Defendant pursuant to 934.091, Florida Statutes (1977) if the names of these individuals are published at this time, and, additionally, the chilling effect of this exposure to such prosecution constitutes an unconstitutional

restraint upon the Plaintiff's right to publish.

6. By the nature of the restraint this cause is of imminent concern and an early adjudication of these issues needed.

WHEREFORE, Plaintiff prays that:

1. This Court take jurisdiction of this cause and the subject matter hereof, including the parties hereto;

2. A decree be entered declaring the provisions of Section 934.091, Florida Statutes (1977) unconstitutional in their application to Plaintiff herein;

3. Advance this cause upon the Court's calendar for an immediate hearing and determination of the issues herein;

4. Grant such other and further relief as is just and proper in the premises; and,

5. Require each party to bear its

own costs herein.

Larry K. Coleman, of the Law
Firm of KNOWLES, BLALOCK,
COLEMAN AND LANDERS, P.A.
802-11th Street West
Post Office Box 469
Bradenton, Fla. 33506
Attorney for Plaintiff

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR MANATEE COUNTY, FLORIDA

THE BRADENTON HERALD, INC., A Florida Corporation,

Plainteiff,

v.

Case No. CA 79-1382
Docket 54,Page 426

JAMES A. GARDNER, as State Attorney for the Twelfth Judicial Circuit of Florida,

Defendant.

AMENDMENT TO COMPLAINT

PLAINTIFF, by and through its undersigned Counsel,amends the Complaint to the extent only as hereafter shown pursuant to Fla.R.Civ.P. 1.190.

1. The phrase "may have or" is inserted in paragraph 5.A. on line 4 thereof after the first two words as pled "which persons" to read: "Plaintiff has the name and identity of persons who have never been indicted nor informed against by the Defendant or other appropriate prosecuting authority

which persons may have or have not now been served . . ."

2. Paragraph 5.E. is amended to delete the next to last word on line 2 thereof being "three", which will now read: "as a consequence of the Defendant's interception of the wire or oral communications of these individuals. . ."

Larry K. Coleman, of the Law
Firm of KNOWLES, BLALOCK,
COLEMAN AND LANDERS
802 11th Street West
Post Office Box 469
Bradenton, Florida 33506
(813) 746-6184

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Edwin Mulock, Esquire,519 13th Street,West, Bradenton, Florida 33505 and to James A. Gardner, Esquire, State Attorney, Manatee County Courthouse, Bradenton, Florida 33505 by Hand delivery this 12th day of September 1979 and to James S. Purdy, Esquire, Asst. Atty. General, Park Trammell Building, 1313 Tampa Street, Suite 804, Tampa, Fllrida 33602 by U.S.Mail delivery this 11th day of September 1979 and to James S. Purdy, Esquire by Hand delivery on the 11th day of September 1979.

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR MANATEE COUNT.

THE BRADENTON HERALD, INC., A Florida Corporation,

Plaintiff,

v.

Case No.CA 79-1382
Docket 54, Page 426

JAMES A. GARDNER, as State Attorney for the Twelfth Judicial Circuit of Florida

AMENDED COMPLAINT

Plaintiff, THE BRADENTON HERALD, INC., a Florida corporation, sues Defendant, JAMES A. GARDNER, as State Attorney for the Twelfth Judicial Cirucit of Florida, and alleges:

1. This is an action maintained pursuant to the provisions of Chapter 86, Florida Statutes (1977) seeking a declaratory judgment as to the constitutionality of the prohibitions and application of Section 934.091,Florida Statutes (1977) to Plaintiff.

2. Defendant is a necessary party consistent with the provisions of Section 86.091, Florida Statutes (1977) being the duly elected State Attorney of the Twelfth Judicial Circuit of Florida, in and for Manatee County, charged with enforcing said criminal statute, Section 934.091, Florida Statutes (1977).

3. Plaintiff maintains its principal place of business within Manatee County, Florida, and is a newspaper of general circulation throughout said County, published on a daily basis.

4. Sedtion 934.091, Florida Statutes (1977) provides as follows:

> (1) No person shall print, publish or broadcase, or cause to be printed, published, or broadcasted in any newspaper, magazine,periodical

or other publication, or from any television or radio broadcasting station, the name or identity of any person served with, or to be served with, an inventory or notification of interception of wire or oral communications pursuant to s. 934.09(7)(e) until said person has been indicted or informed against by the appropriate prosecuting authority.

(1) Whoever is convicted of the violation of the provisions of this section is guilty of a felony of the third degree punishable as provided in s. 775.082 by a fine not to exceed $10,000, or as provided in s.775.084.

5. At the time of the filing of this action there is an imminent threat of criminal prosecution pursuant to the

provisions of the above referenced Statute by Defendant of the Plaintiff for the reasons that:

A. Plaintiff has the name and identity of a person or persons who have neither been indicted nor informed against by the Defendant or other appropriate prosecuting authority which person or persons may or may not have been served with an inventory or notification of intercaption of wire or oral communications pursuant to the provisions of Mection 934.09(7), Florida Statutes (1977), whose wire or oral communications have in fact been intercepted.

B. Plaintiff's purpose and intent is to publish the names of said

individuals as prohibited by the provisions of 934.091, Florida Statutes (1977) which upon the face of said Statute in its application to the Plaintiff herein is unconstitutional.

6. The literal wording and patent overbreadth of said Statute would preclude Plaintiff's publication of the names of said individuals with or without knowledge of any interception and without regard as to whether or not any publication of their name or names is made in connection with a story pertaining to the interception of the wire or oral communications of said individuals or in an article unrelated to any such interception.

7. U.S. CONST., amend, I and XIV, and Article 1, Section 4, Florida Constitution (1968) protects the freedom of press and publication without this:

A. unreasonable prior restraint upon Plaintiff's right to publish; and,

B. criminal penalty for such intentional or unintentional publication.

8. The chilling effect of this exposure to such prior restraint and prosecution constitutes a violation of Plaintiff's above-referenced constitutionally guaranteed right to publish

9. By the nature of the restraint this cause is of imminent concern and an early adjudication of these issues is needed.

WHEREFORE, Plaintiff prays that:

1. This Court take jurisdiction of this cause and the subject matter hereof, including the parties hereto.

2. This cause be advanced on the Court's calendar for an immediate hearing

and determination of the issues herein.

3. A decree be entered declaring the provisions of Section 934.091, Florida Statutes (1977) unconstitutional in their application to the Plaintiff herein;

4. Each party be required to bear its own costs herein; and

5. Such other and further relief as is just and proper in the premises be granted.

Larry K. Coleman of the Law
Firm of KNOWLES,BLALOCK,
COLEMAN AND LANDERS
8021 11th Street West
Bradenton, Fl 33506
(813) 746-6184
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to EDWIN T. MULOCK, ESQUIRE, 519 11th Street West, Bradenton, Fl 33505, JAMES A. GARDNER, ESQUIRE, State Attorney, Manatee County Courthouse, Bradenton, Fl 33505, and JAMES S. PURDY, ESQUIRE, Assistant Attorney General, Park Trammell Building, 1313 Tampa Street, Suite 894, Tampa, Fl 33602 by PERSONAL HAND DELIVERY, this 18th day of September, A.D., 1979.

Larry K. Coleman

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR MANATEE COUNTY, FLORIDA.

THE BRADENTON HERALD, INC.,

Plaintiff,

Case No. CA-79-1382
Docket 54,Page 426

v.

JAMES A. GARDNER, as State Attorney for the Twelfth Judicial Circuit of Florida,

Defendant

AMENDMENT TO AMENDED COMPLAINT

Plaintiff, by and through its undersigned Counsel, amends the Amended Complaint dated September 18, 1979, to the extend only of adding the following paragraph pursuant to the authority of Fla. R. Civ. P. 1.190.

10. Accordingly, Section 934.091,Florida Statutes (1977) is unconstitutional on its face as overly broad, as well as in its application to Plaintiff.

Larry K. Coleman of the Law
Firm of KNOWLES,BLALOCK,COLEMAN
AND LANDERS.
802-11tH Street West
Post Office Box 469
Bradenton, Fl 33506
(813) 726-6184
Attorney for Plaintiff

CERTUFUCATE OF SERVUCE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to the following this 20th day of September, A.D., 1979:
EDWIN T. MULOCK, Esquire, 419-13th Street West, Bradenton Florida 33505, by U.S.MAIL

JAMES A. GARDNER,Esquire,State Attorney, Manatee County Courthouse,Bradenton, Fl. 33505, by U.S.MAIL; and

JAMES S. PURDY, Esquire,Assistant Attorney General,Park Trammell Building,1313 Tampa Street,Suite 804,Tampa, Fl 33602, by U.S. MAIL.

Larry K. Coleman

IN THE CIRCUIT COURT OF THE
TWELFTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR THE COUNTY OF MANATEE

THE BRADENTON HERALD, INC.
A Florida Corporation,

Plaintiff,

v. Case No.CA 89-1382 54 246

JAMES A GARDNER, as
State Attorney for the
Twelfth Judicial Circuit,
Florida

Defendant.

ANSWER

Defendant, James A. Gardner, as State Attorney for the Twelfth Judicial Circuit, answers the plaintiff's complaint and says:

1. Defendant admits those allegations contained in paragraphs 1,2,3,4,5, and 5A of the plaintiff's complaint.

2. Defendant is without knowledge of those allegations contained in paragraph 5B which allege the purpose and intent of the plaintiff and said allegations are therefore denied.

Defendant specifically denies those allegations contained in paragraph 5B which purport to allege that the challenged statute is unconstitutional.

3. Defendant admits those allegations contained in paragraph 7 which allege that feedom of the press and publication are protected by the U.S.Constitution, amend. I and XIV and Article 1, Section 4, Florida Constitution (1968), but denies each and every allegation which purports to show that the challenged statute constitutes an unreasonable prior restraint upon plaintiff's right to publish or that the challenged statute imposes criminal penalties for unintentional acts.

4. Defendant denies each and every allegation contained in paragraphs 6, 8 and 9.

5. Except as specifically admitted in this answer, defendant denies each

and every other allegation raised by the plaintiff's complaint.

6. As and for a first affirmative defense, defendant would allege that the names and identites alleged in paragraph 5A were not lawfully obtained by plaintiff and are therefore not to be afforded protection pursuant to U.S. Constitution amendments I and XIV or Article 1, Section 4, of the Florida Constitution.

WHEREFORE, defendant, having fully answered the plaintiff's complaint, prays that the complaint be dismissed with costs to the plaintiff.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

JAMES S. PURDY
Assistant Attorney General
Park Trammell Building

1313 Tampa Street, Suite
804, Tampa, Florida
33602 (813) 272-2670

Counsel for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer has been furnished by U.S.Mail to Larry K.Coleman, of the Law firm of Knowles,Blalock,Coleman and Landers, 802-11th Street West, P. O. Box 469, Bradenton, Florida 33506 on this the 25th day of September, 1979.

Of Counsel for Defendant

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR MANATEE COUNTY.

THE BRADENTON HERALD, INC., A Florida Corporation,

Plaintiff,

Case No.CA 79-1382
Docket 54,Page 426

JAMES A. GARDNER, as State Attorney for the Twelfth Judicial Circuit of Florida,

Defendant.

ORDER ON PENDING MOTIONS

UPON CONSIDERATION of all pending Motions before this Court on September 13, 1978:

1. As Edwin T. Mulock has advised this Court that he did not receive timely notice of the hearing on his Petition to Intervene, said Petition was not considered and he may obtain time to reschedule same for hearing upon timely notice to all parties.

2. Upon consideration of the Motion to Compel Oral Discovery it is the finding of this Court that the identities of the people held by the Plaintiff shall be

disclosed to the Defendant, although the Plaintiff is not required to disclose unto the Defendant the source of such information as this is not relevant to the issues raised by the pleadings and not appropriate for discovery at this time based upon the provisions of U.S. Const., amend I and XIV, and Article I, Sedtion 4, Florida Constitution (1968). This disclosure is required to enable Defendant to reply to the allegations of paragraph 5 of the Complaint and Plaintiff's compliance with this disclosure order shall not constitute a violation of the provisions of Section 934.091, Florida Statutes (1977).

3. On Tuesday, September 19, 1979, this Court shall hear further argument from Counsel for the parties as to whether or not the names held by the Plaintiff shall be given unto the Defendant in camera

and protected from public disclosure or published without this restriction.

4. Upon consideration of the fourt points raise. in the Motion to Dismiss:

A. The Court finds that the Defendant is a proper party to this action and accordingly Point I of the Motion to Dismiss is denied.

B. In consideration of Point II of the Motion to Dismiss and paragraph 5 of the Complaint it is the opinion of the Court that subparagraph 2 needs to be amended as it is improperly included as a subparagraph thereof, and accordingly, the Plaintiff shall state the specific provisions of the Florida and Federal Constitution that it has placed in issue herein.

C. A memorandum of law in support of the position of the Defendant as set

forth in Point III of the Motion to Dismiss and an opposing memorandum shall be presented to this Court on the issue of whether or not the Complaint must contain factual allegations showing the information Plaintiff seeks to publish and the lawful obtention thereof as a condition precedent to stating a cause of action; and, argument on this Point may be further heard before this Court on Tuesday, September 18, 1979, at 2:00 P. M. in Chambers at the Manatee County Courthouse.

D. A sufficient threat of criminal prosecution has been alleged by the Complaint, and accordingly, Point IV of the Motion to Dismiss is denied.

E. Defendant shall have ten (10) days from service of the Amended Complaint within which to reply thereto.

DONE AND ORDERED in Chambers at the Manatee County Courthouse, situated at Braddnton, Florida this ___ day of September, A.D., 1979.

ROBERT E. HENSLEY,
Circuit Judge

COPIES FURNISHED TO:

LARRY KN. COLEMAN, ESQUIRE
JAMES S. PURDY, ESQUIRE

IN THE CIRCUIT COURT OF THE
TWELFTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR THE COUNTY OF MANATEE

THE BRADENTON HERALD, INC.

Plaintiff,

v. Case No. CA79-1382
54 426

JAMES A. GARDNER, as State
Attorney for the Twelfth
Judicial Circuit of Florida,

Defendant.

AMENDMENT TO ANSWER

Defendant, James A. Gardner, State Attorney for the Twelfth Judicial Circuit, State of Florida, amends his answer filed in the above-styled cause to add the following affirmative defense:

AFFIRMATIVE DEFENSE

The State of Florida and the defendant in his official capacity have a compelling governmental interest in this statute justifying the limited restriction of plaintiff's first

amendment right imposed by the statute. This compelling interest is the protection of the secrecy of criminal investigations conducted by the state attorney and the law enforcement personnel for the purposes of gathering evidence and investigating criminal activity. The State of Florida and the defendant have a further compelling governmental interest in protecting the right of privacy of those people whose telephones are the subject of wiretap orders until such time as they are informed against or indicted. The State of Florida and the defendant herein have a compelling governmental interest in protecting the right to privacy of those persons whose telephones are the subject of a wiretap order and who are not informed against or indicted for any reason including but not limited to the

lack of evidence against the subject.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

JAMES S. PURDY
Assistant Attorney General
Park Trammell Building
1313 Tampa Street, Suite
804, Tampa, Florida 33602
(813) 272-2670

Counsel for Defendant

STIPULATION TO AMENDMENT TO ANSWER AND REPLY TO AMENDMENT

I, Larry Coleman, Esquire, Attorney for Plaintiff, have no objection to allowing defendant to amend his answer to add the above affirmative defense without argument or hearing before the court. The parties shall consider the affirmative defense as an issue in the case subject to Plaintiff's Motion to Strike It.

As a reply to the affirmative

defense the plaintiff denies each and every allegation contained therein for the reasons stated in the Reply to Affirmative Defense.

LARRY COLEMAN
Attorney for Plaintiff

CERTIFICATE OF SERVICE

Counsel for plaintiff and defendant certify to this court that each has received a copy of the foregoing Amendment to Answer and Stipulation to Amendment to Answer and Reply to Amendment.

LARRY COLEMAN
Attorney for Plaintiff

JAMES S. PURDY
Counsel for Defendant

CERTIFICATE OF SERVICE

I, Larry Coleman, Esquire, hereby certify that a true and correct copy of the foregoing pleading has been furnished by personal delivery to Edwin T. Mulock, Esquire, Counsel for Intervenor, John Doe,

519 13th Street, W., Bradenton, Florida 33505 on this the 15th day of September, 1979.

LARRY K. COLEMAN
Attorney for Plaintiff
Law Firm of Knowles,Blalock, Coleman & Landers
802-11th Street West
P. O. Box 469
Bradenton,Florida 33506

IN THE CIRCUIT COURT OF THE TWELFTH
JUDICIAL CIRCUIT OF FLORIDA IN AND
FOR MANATEE COUNTY, FLORIDA

THE BRADENTON HERALD, INC.,
A Florida Corporation,

Case CA-79-1383
54 426

Plaintiff

v.

JAMES GARDNER, as State
Attorney for the Twelfth
Judicial Circuit of Florida,

Defendant.

FINAL JUDGMENT

This action brings into question the constitutionality of Florida Statute 934.091. The statute in question is obviously unconstitutional, in part, on the basis of its vagueness and uncertainty. That part of the statute which refers to persons--"to be served with--pursuant to s. 934.09(7)(e)" includes "--such other parties as the judge may determine in his discretion that is in the interest of justice--" No publisher or broadcaster

could determine from the statute all the persons whose names or identity are protected by the statute until a court had finally acted upon its discretion to determine who would be served with a notification or inventory. This part of the statute, if held constitutional, could make criminal the publication of the name or identity of a person who would only come under the protection of the statute after the publication thereof, and is therefore clearly unconstitutional.

The only persons who,with certainty, come under the protection of the statute, are those "--persons named in the order or the application--". The testimony shows that the subject in this case was one whose telephone was the subject of the wiretap and therefore falls within the protected class, with certainty, This

being true, the statute, as it relates to the subject of this case, is not unconstitutionally vague.

The parties have not furnished to this Court the legislative history which might disclose the principal purpose of this part of the statute and this Court does mot have available to it the facilities to research the legislative history. The act itself suggests two possible purposes. The first might be to avoid a premature disclosure of the existence of a legal wiretap, so as to disrupt and destroy an ongoing investigation into criminal activity. The second, which was set forth in the statute prior to the addition of this section, would be the right of the protected class to privacy.

The parties have not pointed out, and this Court is not aware of, any cases which have been decided on the points

raised herein. However, those cases which have been decided on the question of a governmental need to suppress information from the public have, in some cases, upheld the right of the government to deny the press access to information, but no cases have denied the right to publish such information if lawfully obtained. It is interesting to note that there appears to be no criminal penalties in the act that would apply to any person furnishing such information to the press. There are criminal penalties relating to such disclosures, but they apply only to illegal wiretaps.

On the question of the right to privacy, neither the Supreme Court of the United States nor the Supreme Court of Florida have seen fit to define such a right in this area of the law. In the

recent case ROBERT L. SHEVIN, etc.et al. v. BYRON HARLESS, SCHAFFER,REID AND ASSOCIATES, INC., etc. et al, (January 17, 1980) Nos. 54, 405 and 54,406, the Supreme Court of Florida stated,at page 8,

> "Just as in Whalen, the Court in Nixon acknowledged that such a privacy interest exists but did not describe or define it, nor did it establish a standard of review to be employed in determining when this interest has been transgressed."

There is no question but what we have established, by constitutional mandate, the freedom of the press. This Court is unwilling to restrict such freedom, under the facts of this case, by a yet undefined right of privacy,. It is thereupon

ORDERED AND ADJUDGED that the questioned statute is unconstitutional and may not be enforced because it is

both unconstitutionally vague and is an unwarranted and unconstitutional restriction on the freedom of the press.

DONE AND ORDERED at Bradenton, Florida, this 12th day of February, 1980.

/s/ Robert E. Hensley
Circuit Judge

Copies furnished to:

James Gardner, Esq.
Edwin T. Mulock, Esq.
James S. Purdy, Esq.
Larry K. Coleman, Esq.

IN THE CIRCUIT COURT OF THE
TWELFTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR THE COUNTY OF MANATEE

THE BRADENTON HERALD, INC.,

Plaintiff,

v. Case No. CA79-3182
54 426

JAMES A. GARDNER, as State Attorney for the Twelfth Judicial Circuit of Florida,

Defendant.

MOTION FOR REHEARING

Comes now the defendant, James A. Gardner, as State Attorney for the Twelfth Judicial Circuit of Florida, by and through the undersigned assistant attorney general and moves for a rehearing in the above styled cause pursuant to Rule 1.530 Fla.R. Civ.P. and grounds therefore would show:

I

Final Judgment was entered in the above styled cause by this honorable court on February 12, 1980.

II

Paragraph one of the Final Judgment entered in this cause declares Section 934.091, Fla. Stat. (1977) to be unconstitutional on the basis of vagueness and uncertainty. However, there has never been any allegation in this cause that the subject statute is unconstitutional on the grounds of vagueness or uncertainty. The final judgment therefore addresses an issue and declares a Florida Statute unconstitutional for a reason not raised by the pleadings in this cause and which was never addressed as an issue in the case by any of the parties. Indeed, the words "vagueness" and "uncertainty" cannot be found anywhere in the amended complaint.

Additionally, since this court found that the intervenor, John Doe, was

a person "named in the order on the application" pursuant to Section 934.09 (7)(c) Fla. Stat. (1977) and allowed him to remain in this action as a party intervenor, the court improperly determined the issue of vagueness concerning ". . .such other parties as the judge may determine in his discretion that in the interest of justice. . ." as it applied to the subject statute and the facts of this case. That portion of the statute was not challenged.

III

The decision of the court is contrary to the law and the weight of the evidence.

In paragraph 4 of the Final Judgment, the court states:

> "The parties have not pointed out, and this court is not aware of any cases which have been decided on the points raised herein. However, those cases which have been decided on the question of a governmental need to suppress information from the public have, in some cases, upheld the right of the government to deny the press <u>access</u> to

information, but no such cases have denied the right to publish such information if lawfully obtained. It is interesting to note that there appears to be no criminal penalties in the act that would apply to any person furnishing such information to the press. There are criminal penalties relating to such disclosures, but they apply only to illegal wiretaps."

This holding overlooks or fails to consider the case of Cox Broadcasting Corp. v. Cohn, 420 U.S.469, 95 S.Ct.1029, 43 L.Ed 2d 328 (1975). In Cox, the court addressed a Georgia statute quite similar to the one at issue which provided for criminal sanctions on broadcasters who publish the name or identities of rape victims. The court noted in Footnote 1 that Florida has a similar statute. See Sections 974.01 and 974.04, Fla. Stat. (1979). The Supreme Court did not hold the statute unconstitutional. The ruling of the court was that once the information sought to be published is in the public records, a cause of action will not stand.

As the court is aware, the information sought to be published in this action, (the identity of intervenor, John Doe) is not in the public records.

The court also appears to hold in paragraph 4 that the information sought to be published was "lawfully obtained." This is contrary to the weight of the evidence since this court struck the defendant's affirmative defense and would not require plaintiff's agent to disclose the manner in which the information was obtained.

The court also holds in paragraph 4 that there appears to be no criminal penalties in the act for those persons who furnish information to the press. The court, respectfully, overlooked or failed to consider the fact that this same provision applies not only to those who publish but also to those *persons who*

cause to be published. See definition' of "person" Section 934.02(5),Fla. Stat. (1979). Also, the person supplying such information is in direct contempt of the court order authorizing the interception. See Section 934.09(7)(c) and (d), Fla. Stat. (1979). The information is therefore not lawfully obtained.

IV

The court overlooked or failed to consider the strong compelling governmental interests which are served by this statute. The statute is not only intended to serve a strong policy of protecting the right to privacy of the intervenor in this cause, it is also intended to serve the compelling governmental interest in secrecy of criminal investigations. A secret intercept of wire or oral connumications pursuant to a court order is of little or no use if the person who is the subject to

the intercept is informed through the media that his conversations are being intercepted in connection with a criminal investigation.

For the above and foregoing reasons, this Motion for Rehearing should be granted. Defendant requests this Court allow the introduction of additional testimony to establish the existence of the state's compelling governmental interest.

Wherefore, the defendant prays this honorable court grant this motion for rehearing.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

JAMES S. PURDY
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
Counsel for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Motion for Rehearing has been furnished by U.S. Mail to Larry Coleman, Coleman and Landers, 802-11th Street West, P. O. Box 469, Bradenton, Florida 33506, Edwin T. Mulock, Esquire, 519-13th Street West, Bradenton, Florida 33505, on this 30th day of February 1980.

_____

Of Counsel for Defendant

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT IN AND FOR MANATEE COUNTY FLORIDA

THE BRADENTON HERALD, INC., A Florida Corporation,

Plaintiff,

Case No. CA-79-1383
54 246

v.

JAMES GARDNER, as State Attorney for the Twelfth Judicial Circuit,

Defendant.

ORDER ON MOTION FOR REHEARING AND STAY PENDING APPEAL

This cause having come on to be heard on the Defendant's Motion for Rehearing and the Intervenor Motion for Stay Pending Appeal and the Court having heard the argument of Counsel for the Plaintiff, Defendant and Intervenor and being otherwise duly advised, it is

ORDERED AND ADJUDGED that the Motion for Rehearing is denied; it is further

ORDERED AND ADJUDGED that the intervenor's Motion for Stay Pending Appeal is denied on the grounds that the Defendant has represented to this Court that he will take appeal and being a public official within the neaning of Rule 9.310(b)(2), Fla. R. App.P., the final judgment of this Court will be automatically stayed.

DONE AND ORDERED in Bradenton this 28th day of February, 1980.

ROBERT E. HENSLEY
CIRCUIT JUDGE

COPIES FURNISHED TO:

Larry K.Coleman,Esq.802-11th Street West Bradenton, Florida
James S. Purdy, Esq. 1313 Tampa Street Tampa, Florida
Edwin T. Mulock,Esq.519-13th Street West Bradenton, Florida
James A. Gardner,Esq.Manatee County Courthouse, Bradenton, Florida

IN THE SUPREME COURT OF FLORIDA

JAMES A. GARDNER,

Appellant,

v. Case No. 58,761

THE BRADENTON HERALD, INC.

Appellee.

PETITION FOR REHEARING

Appellant, James A. Gardner, by and through the undersigned assistant attorney general, petitions for rehearing in the instant cause, pursuant to Fla.R.App. P. 9.330 and would show:

I

Section 934.091, Florida Statutes (1979) makes it a third degree felony for any person to publish or broadcase in a newspaper, publication, or electronic medium, the name of any person who is a party to an interception of wire or oral communications until that person has been indicted or informed against. In this

Court's majority opinion of March 4, 1982, this Court affirmed a trial court judgment holding this Section unconstitutional. In reaching this conclusion this court determined that Section 934.091 creates an unconstitutional restraint upon the freedom of the press guaranteed by the First and Fourteenth Amendments to the United States Constitution.

II

While the Appellant is not unmindful of the role of the press and the ends to be achieved through the freedom afforded to it. Appellant believes that the Court has overlooked the extremely important State interests protected by Section 934.091. The first is the protection of an ongoing criminal investigation. The second is the right to privacy of an individual who is subject of the wiretap. As Justice Adkins aptly noted in his dissenting opinion, the

disclosure of one individual's name may affect a multitude of individuals:

> ". . .There can be no doubt that the protection of an ongoing criminal investigation is the compelling governmental interest of the highest order, which is rendered useless when a subject reads in a newspaper or sees a report on television that his phone is presently being wiretapped in connection with a criminal investigation. The injury does not stop there. Wherever a wiretap order is issued, there has to be probable cause to believe communications concerning an offense will be intercepted. This presupposes that more than one individual is involved in the crime. Therefore, if but one person's name is purblished, an entire investigation into the criminal activities of numerous individuals is destroyed. This is particularly true in investigations concerning narcotic or other dangerous drugs, gambling, dealing in stolen property, Florida anti-fencing act violations, and criminal conspiracies to commit such acts. Such a disclosure can also endanger the life of an individual, as in kidnapping cases. . ."

The intrusion into the First Amendment which this statute entails is minimal when

balanced against the State's interests in protecting ongoing criminal investigations and an individual's privacy who may be the subject of the wiretap. Section 934.091 only abridges publication of the name and identity of the person served with or to be served with an inventory or notification of interception until that person has been indicted or informed against. When the secrecy of the investigation is no longer imperative, the statute allows publication. Appellant would respectfully request that this Court reconsider its opinion of March 4, 1982 in the light of the extremely important State interests involved and declare Section 934.091, Florida Statutes constitutional.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

MICHAEL J. KOTLER
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Tampa, Florida 33602
(813) 272-2670

Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to Larry K. Coleman, Esquire, Knowles, Blalock, Coleman & Landers, P.A., 802-11th Street West, Bardenton, Florida on this the 19th day of March 1982.

Of Counsel for Appellant

SUPREME COURT OF FLORIDA

WEDNESDAY, APRIL 28, 1982

JAMES A.GARDNER, Appellant, v. THE BRADENTON HERALD,INC. Appellee.	CASE NO. 58,761 CONSOLIDATED CASES
* * * * * * * * * * * * * * * *	
JOHN DOE, Appellant, v. THE BRADENTON HERALD, INC. Appellee.	CASE NO. 58,735 Circuit Court Manatee 79-1383 54 426

Upon consideration of the Petition for Rehearing filed in the above styled causes by attorney for JAMES A. GARDNER, and response thereto,

IT IS ORDERED that said Petition be and the same is hereby denied.

SUNDBERG, C.J., BOYD, OVERTON, ALDERMAN, and McDONALD, JJ., CONCUR
ADKINS,J., dissents.

Motion to Stay Mandate filed in the above causes by attorney for JAMES A. GARDNER is hereby granted and proceedings in this Court and in the Circuit Court of the Twelfth Judicial Circuit, in and for Manatee County, Florida, are hereby stayed to and including May 28, 1982, to allow Appellants to seek review in the Supreme Court of the United States and obtain any further stay from that Court.

A True Copy
TEST:

Sid J. White
Clerk,Supreme
ourt

BY /s/Tanya
Carroll
Deputy Clerk

TC

cc: Hon Richard B.Shore III, Clerk
Hon. Robert E.Hensley, Judge

Michael J. Kotler, Esq.
Edwin T. Mulock, Esq.
Larry K. Coleman, Esq.

IN THE SUPREME COURT OF FLORIDA

JAMES A. GARDNER,

Appellant,

v. Case No. 48,761

THE BRADENTON HERALD, INC.,

Appellee.

MOTION TO STAY MANDATE

Comes now the Appellant, Jamea A. Gardner, by and through the undersigned assistant attorney general, and respectfully requests that this Court stay the mandate in the instant cause, and as grounds, therefore, would show:

I

On May 19, 1982, Appellant filed a Petition for Rehearing. If this Court should deny said Petition, Appellant intends to make application to the United States Supreme Court for writ of certiorari.

WHEREFORE, Appellant respectfully moves this Court for an order staying the mandate.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

MICHAEL J. KOTLER
Assistant Attorney General
Park Trammell Building
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804, Tampa, Florida 33602
(813) 272-2670

Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S.Mail to Larry K.Coleman, Esquire, Knowles, Blalock,Coleman & Landers, P.A., 802-11th Street, West, Bradenton, Florida 33505 on this the 19th day of March,1982.

Of Counsel for Appellant

Office of the Clerk
SUPREME COURT OF THE UNITED STATES
Washington, D. C. 20543

May 25, 1982

Michael J. Kotler, Esq.
Assistant Attorney General
804 Park Trammell Building
1313 Tampa Street
Tampa, Florida 33602

RE: James A. Gardner
v Bradenton Herald, Inc.
A-978

Dear Mr. Kotler:

Your application for a stay in the above-entitled case, together with the response filed thereto, has been presented to Justice Powell. The Justice has endorsed the following on the face of your application:

"Denied
L.F.P.
5/25/82"

Very truly yours,

ALEXANDER L. STEVAS, Clerk

By /s/ Katherine Downs
Katherine Downs
Assistant Clerk

rwk
cc: Larry K. Coleman, Esq.

82-244

Office - Supreme Court, U.S.
FILED
AUG 18 1982
ALEXANDER L. STEVAS
CLERK

No. _____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

JAMES A. GARDNER, *Petitioner*,

v.

THE BRADENTON HERALD, INC., *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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References are made within this brief to the appendix filed with the Petition for Certiorari.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. _____

JAMES A. GARDNER, *Petitioner*,

v.

THE BRADENTON HERALD, INC., *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

REASONS FOR DENYING THE WRIT

§ 934.091, Fla. Stat. (1977) Is An Unwarranted And Constitutionally Unauthorized Restriction On The Freedom Of The Press, As Guaranteed By U.S. Const. Amend. I And XIV

> "The sole and limited issue for . . . determination concerns the authority of the state to direct without exception of procedural safeguards the criminal punishment of any person who truthfully publishes without malice the name of an unindicted subject of interceptions or wiretaps.
>
> "The absolute terms of this statute effectively result in a prior restraint on the press. Prior restraints have always been accorded the most exacting judicial scrutiny. *Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546 (1975)." *Gardner* v. *The Bradenton Herald, Inc.*, ___ So. 2d. ___ (1982). (A. 2)

This litigation involves no claim of special access to police, investigative information; the publication of the

contents of intercepted communications; or, civil liabilities for damages resulting from a publication. The remaining provisions of the Florida security of communications statute, §934.10, Fla. Stat. (1977) (which have not been challenged in this litigation), provide a civil remedy, including compensatory damages of $100.00 per day up to $1,000.00, punitive damages and attorney's fees, to a person whose communication has been violated, contrary to the provisions of the statute. Disclosure of information obtained during a lawfully authorized and judicially supervised communication intercept is not a crime. This was noted in the Final Judgment rendered by the trial court. (A. 27) Petitioner emphasized the importance of wiretaps and the frequency with which they are authorized; however, the subject decision does not involve these issues. Although the Florida wiretap statute is similar to the federal act, 18 U.S.C. §§ 2510-2520 (1968), there is no provision in this federal statute which corresponds with the challenged Florida statute.

This statutory prohibition from publication continues after the parties to intercepted communication have been notified of the date and period of the interception; contents thereof; and, applications and orders relating thereto. Consent to publication by the subject does not remove criminal liability. As noted in the trial court's Judgment (A. 26), an innocent publication of the subject's name or identity without reference to the interception is prohibited.

This legislated silencing of the press has no definite period of limitation, ending only *if* an indictment or criminal information is eventually filed. Even after the investigation is over and the subject's accomplice or associate in crime is prosecuted, no statutory exception exists to authorize the publication of the name of the subject

who may by then even be identified in official court records. In the case *sub judicia* all criminal investigations and proceedings have been concluded but because John Doe was never indicted or informed against, Respondent's publication of his identity is prohibited by the subject statute. The press is the single target of prosecution for naming or identifying the subject through broadcast, newspaper, magazine, periodical, or news publication. The maximum penalties are $10,000.00 and five years imprisonment.

The Florida Supreme Court enumerated the statutory deficiencies as follows:

> "We do not minimize the asserted state interests which could be affected by the contemplated publication. We believe it is important to recognize that we are not faced in this cause with a narrowly drawn statute closely tailored to interests such as protecting the national security, protecting the safety of undercover officers, preserving an ongoing investigation,, protecting the life of a kidnap victim, or ensuring a fair trial. Nor are we faced with a statute incorporating adequate procedural safeguards such as a prior hearing before a court of competent jurisdiction, which would allow a balancing of interests." (A. 5)

This Court addressed the almost identical issue presented in the present case in *Landmark Communications* v. *Virginia*, 435 U.S. 829, 98 S. Ct. 1535, 56 L. Ed. 2d 1 (1978). The Virginia Supreme Court had ruled that maintaining confidentiality in a state commission's investigation of a judge's fitness was required to: protect the judge's reputation from adverse publicity; maintain confidence in the judicial system; and, protect complainants and witnesses from possible recrimination prior to validation of a complaint. In rejecting the express findings of the Virginia Supreme Court that the "clear

and present danger" test had been satisfied, in the furtherance of these laudable state purposes, which the Virginia legislature had also expressed to be purposes of the act, this Court, speaking through Mr. Chief Justice Burger, held that these "justifications" were constitutionally deficient. The accomplishments of confidentiality in judicial investigations was insufficient to allow such potential or actual infringement upon the freedom of the press. Such constitutionally prohibited legislation amounted to the punishment of third persons, who were strangers to secret investigations. Punishment resulted from the publication of truthful information obtained from confidential informants. Such censorship would necessarily cut "near the core of the First Amendment . . ." *id.* 838.

Petitioner places much emphasis upon the proposition that the lawful obtainment from within the public domain of the material to be published is a necessary condition precedent to publication. The cited cases of *Cox Broadcasting Corporation* v. *Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975); and, *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 99 S. Ct. 2667, 61 L. Ed. 2d 399 (1979), contain these factual elements but no decision has been cited which expressly held this to be a *requirement*. In *Landmark*, *supra*, information was obtained from a confidential informant who was subject to sanctions for disclosing the information that was not open to public inspection or already within the public domain.

The *Branzburg* v. *Hayes*, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972), decision recognized that the press was not required to obtain information from only within the public domain. While ruling that newspaper reporters could be compelled to testify to grand juries about their

public knowledge of criminal acts and personalities, this Court expressly limited its decision and stated:

> ". . . without some protection for seeking out the news, freedom of the press could be eviscerated. . . . no penalty, civil or criminal, related to the content of published material is at issue. . . . *id.* 682.
>
> "This conclusion itself involves no restraint on what newspapers may publish or on the type or quality of information reporters may seek to acquire, nor does it threaten the vast bulk of confidential relationships between reporters and their sources." *id.* 691.

Staff reporter Branzburg published through the press the criminal act he had observed. Neither *Branzburg* nor the present case before this Court involve any claim that a special right of access to government information exists, contrary to Petitioner's extensive argument of law on this subject as illustrated by his citation of *Pell* v. *Procunier*, 417 U.S. 817, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974).

Although, as noted by Petitioner, the distinction between a true "prior restraint" case through injunction and one resulting from criminal sanctions is without a difference, *New York Times Company* v. *United States*, 403 U.S. 713, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971) was a true "prior restraint" case. The advocated, compelling state interest to be protected by prohibiting the publication of the classified "Pentagon Papers" was national security, as distinguished from the protection of the participants in and subjects of a wiretap. A crime was, in fact, committed when the "Papers" were provided by a confidential informant to the press, whereas the "leak" of John Doe's name to The Bradenton Herald violated no criminal law. It was recognized that a publication of the "Papers" would not only be embarrassing to the government but that it could also jeopardize the diplomatic corps

in our country's "first line of defense" and possibly even the personal safety of our soldiers. Yet, with such compelling state interests, the provisions of the First Amendment protected the right of the press to publish the sensitive information it possessed, without regard to how it was obtained.

The "criminal sanctions" restraint as advocated by Petitioner for the protection of disclosural privacy is an improperly selected "tool" with which to accomplish this objective. Such implementation would be analogous to seeking an injunction against defamatory publications, which is prohibited by Florida law. *Moore* v. *City Dry Cleaners & Laundry, Inc.*, 41 So. 2d 865 (Fla. 1949). As illustrated by the decision of *New York Times, supra*, an extremely strong justification must exist for the imposition of a prior restraint of expression. No such justification exists in either this case or in *Landmark, supra*. To accept Petitioner's argument would constitute an invitation to legislate, without any limitation or standard in the name of "state interest," prohibitions against the publication of information known to the press. Such an invitation is constitutionally impermissible in our United States. U.S. Const. amend. I and XIV.

Petitioner's advancement that John Doe's right of privacy constitutes a sufficient state interest to withstand the constitutional challenge of the subject statute appears to be much less significant than the state interests expressed in *New York Times* and *Landmark, supra*. The zone of privacy emerging from the Bill of Rights and limitations expressed therein, as recognized by this Court in *Paul* v. *Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976), and that provided under Florida law, were considered by the Florida Supreme Court in this litigation. However, the emerging and yet

briefly defined right of privacy was contrasted with the better defined and expressly protected freedom and liberty of the press. That Court, having considered the disclosural privacy issues, as again presented by Petitioner herein, stated:

> "We also do not have before us, nor do we reach, any question concerning the possible private cause of action that John Doe or similarly situated persons might have for libel or invasion of privacy against any news medium. . . . The state in the person of the state attorney has no standing in this proceeding to assert the privacy rights of those persons it has wiretapped." (A. 4)

As previously noted, civil, statutory remedies are provided to redress wrongs resulting from a violation of the Florida wiretap statute. Because the remaining authorities cited in support of the Petition are distinguishable from this case, there is not a sufficient justification for further review of the limited issue presented herein.

United States v. *Fuller*, 202 F. Supp. 356 (N.D. Cal. 1962), cited by Petitioner, upheld a statute prohibiting interception of police communications. The case is not on point as Respondent seeks no special access to information or the right to intercept communications. Rather it sought to exercise its right to publish the fact that John Doe was wiretapped. Petitioner notes in his brief that the press

> ". . . guards against the miscarriage of justice by subjecting the police, prosecutors and judicial processes to extensive public scrutiny. . . ." *Sheppard* v. *Maxwell*, 384 U.S. 333, 350, 86 S. Ct. 1507, 16 L. Ed. 2d 200 (1966).

§ 934.091, Fla. Stat. (1977) unconstitutionally limits this function.

Petitioner's citation of *State* v. *Evjue*, 33 N.W. 2d 305 (Wisc. 1948), and *Nappier* v. *Jefferson Standard Life Insurance Company*, 322 F. 2d 502 (4th Cir. 1963), as analogous to the case at bar, in view of the subsequent decision of this Court in *Cox Broadcasting Corporation* v. *Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975), does not appear to be meritorious. These cases are discussed in his cited annotation of 86 ALR 3d 80, which notes the infrequency of such rulings. The identification of a sexual assault victim, the subject of both of those cases, is included in the invasion of privacy category of Am. L. Inst., Restatement of Torts 2d §§652A-6521 (Tentative Draft No. 22) (April 5, 1976), creating liability for publishing matters concerning one's private life. Excluded from liability in this category are matters of legitimate concern to the public. The identity of a sex crime victim is not of such concern:

> "At most the publication of the identity of the female ministers to a morbid desire to connect the details of one of the most detestable crimes known to the law with the identity of the victim." *State* v. *Evjue*, *supra* 312.

However, the activity of the police in investigating crime and conducting wiretaps is of public concern.

In *Cox Broadcasting Corporation*, *supra*, this Court held that the republication of a rape victim's name from records open to public inspection, contrary to a Georgia statute imposing criminal penalties therefor, did not give rise to a civil cause of action for invasion of the father's right of privacy. The *Nappier*, *supra*, decision noted that, absent a shield statute, fear of publicity would deter victims from reporting sex crimes and thereby thwart prompt investigation of the crime. The advancement of such a "public interest" is not within § 934.091, Fla. Stat.

(1977), and the absoluteness of these decisions has been diluted by *Cox Broadcasting Corporation, supra.* A more analgous factual comparison with the case *sub jucicia* are the cases of *Landmark* and *New York Times, supra.*

The removal of § 934.091, Fla. Stat. (1977) from the laws of Florida will in no way affect the privacy rights of John Doe or the State's investigative abilities. Judicial enforcement and control over investigative personnel during communication intercepts through the contempt powers of the authorizing court are neither changed nor affected by the Florida Supreme Court's decision herein.

CONCLUSION

Respondent respectfully urges this Court to deny the Petition upon consideration of the areas of law addressed by the parties as the issue presented in the Petition has already been settled by this Court, there being no justification for the issuance of a Writ of Certiorari to the Supreme Court of Florida.

Respectfully submitted,

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